MOHD AZAM SHUJA & 4 ORS

v.

UNITED MALAYAN BANKING CORPORATION BHD.

HIGH COURT MALAYA, SHAH ALAM
DATO' K.C. VOHRAH J
[CIVIL APPEAL NO. 12-21-1991]
22 DECEMBER 1994

***TORT** : Claim against solicitors for negligence - Bank granting loan subject to legal charge on property - Bank releasing loan based on solicitors advice that property approved to be charged was free from encumbrances and that charge was duly presented for registration - Property in fact caveated - Default in repayment - Whether the bank in fact suffered loss - Lower Court granting summary judgment to bank - Appeal against decision.*

The appellants/solicitors were retained by the respondent/bank in respect of a loan transaction which was to be secured by a legal charge over a piece of property. The solicitors advised the bank that the property which was approved to be charged was free from encumbrances and that the charge had been duly presented for registration.

The bank, acting on the advice of the solicitors, released the loan amount to the borrower but was subsequently advised that the property was actually caveated and was not free from encumbrances. The borrower defaulted in repayment and the bank sought redress against the solicitors.

The solicitors argued that the sum released was not a loan to the borrower as the said amount was credited into another account of the borrower which reduced the indebtedness of the borrower to the bank. The solicitors therefore contended that the bank had not suffered any loss.

The learned Judge of the Sessions Court gave judgment to the bank under O. 26A of the Suboridinate Courts Rules 1980 and the solicitors appealed.

Held:

[1] It is difficult to see how the solicitors can deny that the bank had released the sum of RM59,004 as a loan. What has to be noted is that the sum was released to the same account number which was stipulated in the bank's letter of approval for the loan to the borrower. The sum was clearly released as a loan and that the said sum reduced the borrower's overdraft standing is quite irrelevant. Once the said sum was released to the account of the borrower, which was stipulated in the bank's letter of approval, the money ceased to be the money of the bank and it became the money of the borrower.

[2] The loan that was advanced was supposed to have been secured against a charge on the property and had been released on the negligent advice of the solicitors that the charge had been duly presented for registration. If the charge had been registered the bank would have been entitled to recover the loan amount by the sale of the said property under s. 256 of the National Land Code and this was surely the recoverable loss which could have been reasonably foreseen by the solicitors.

[3] It is not for the solicitors to say that the bank should have mitigated damages by suing the borrower for the loan or by taking proceedings to remove the caveat. The bank has no standing to take proceedings to remove the caveat. In any event it is difficult to see why

the bank, which in the normal course of banking business prudently relied on the legal device of a charge on the said property to make good any default on a loan and which called for and confidently relied on the advice of solicitors, should be put to extra expense and protracted legal proceedings to recover the loan amount from the borrower himself if at all any of the said amount can be recovered from the borrower.

[4] In the circumstances, there was no merit in the appeal of the solicitors against the decision of the Judge of the Sessions Court giving judgment to the bank under O. 26A SCR 1980. However, as Counsel for the respondent has conceded that the sum of RM996 solicitor's fees should have been deducted from the sum of RM60,000 and the interest given should have been at 11% from the date of release of loan up to the date of judgment and thereafter at 8%, the solicitors appeal should be allowed in part.

[Orders accordingly. Costs to the respondent]

Cases referred to:
Livingstone v. Raywards Coal Co [1880] 5 App Cas 25 ***(foll)***
Pilkington v. Wood [1953] 2A11 ER 810 at 813 ***(refd)***
Drummer v. Brown [1953] Qb 710 ***(refd)***

Legislation referred to:
Subordinate Courts Rules 1980, O. 14 r. 21, O. 26A

Other sources referred to:
Charlesworth and Percy on Negligence, 8 Edn., p. 654,

For the appellants - Paul Kwong; M/s.Azman, Davidson & Co.
For the respondent - Sujata; M/s. Ong Kok Bin & Co.

JUDGMENT

K.C. Vohrah J:

This is a Sessions Court matter which was taken up on appeal before me.

A company, Denson & Co. (the borrower), applied to the respondent bank (the bank) for a loan of RM60,000 to be secured by way of legal charge over a piece of property held under PT(M) 421 Lot 7975 Mukim Klang.

The appellants, solicitors and partners of a firm (the solicitors), were retained by the bank on 27 February 1987 as their solicitors in respect of the loan transaction.

On 27 June 1987 the solicitors advised the bank that the documents in respect of the loan had been completed and that the property which was approved to be charged to the bank was free from encumbrances and that the charge had been duly presented for registration. The solicitors further advised the bank to release the loan to the borrower.

On 8 July 1987, however, the solicitors informed the bank that the said property was actually caveated and was not free from encumbrances. But 5 days earlier acting on the earlier advice from the solicitors, the bank had released the RM60,000 to the borrower.

The bank sued the solicitors for negligence and claimed damages in the sum of RM66,859.40 (made up of the amount released and interest on the sum amounting to RM6,859.40) and further interest at the rate of 11% p.a. on monthly rests from 1 June 1988 till the date of payment.

While the bank claimed the sum of RM60,000 was a loan that was released while acting on the advice of the solicitors, the solicitors disputed that the sum of RM60,000 was a loan to the borrower. They alleged that the said amount was credited into another account of the borrower which reduced the indebtedness of the borrower to the bank. There were other peripheral matters that were also disputed.

The bank in the Sessions Court at Klang applied for the statement of defence of the solicitors to be struck out under O. 14 r. 21 of the Subordinate Courts Rules for not disclosing a reasonable defence, for being frivolous and vexatious and for being an abuse for the process of the Court. Alternatively, the bank applied for liberty to enter final judgment under O. 26A of the Rules.

The Judge of the Sessions Court gave judgment to the bank under O. 26A as prayed for.

In the appeal before me there was no dispute that the solicitors had been negligent but Counsel for the solicitors argued that no loss had been suffered by the bank. In the meantime Counsel for the bank conceded that the sum of RM996 as the legal fees should have been deducted from the RM60,000 released, thus leaving a balance of RM59,004 as the judgment sum with interest at 11% p.a. from 3 July 1987 up to the date of judgment in the Sessions Court and thereafter at 8% p.a. till date of realisation.

The question is, did the bank suffer loss? If so, how much was the loss?

The loan that was approved for the borrower was for "banking facilities under your current account no.1333-03791-1" (see letter of approval of bank, CTZ1 at p. 67 of appeal record). The bank on 3 July 1987 released the sum of RM60,000 less the sum of RM996 (being legal fees payable to the solicitors) (see affidavit of the manager of the bank sub-branch at Port Klang - Yap Kuan Bon paragraph 5, p. 63 of appeal record) to the borrower. This amounted to RM59,004 and was credited into the current account of the borrower, account no.1333-03791-1 (see copy of credit advice p. 70 of appeal record).

It is difficult to see how the solicitors can deny that the bank had released the sum of RM59,004 as a loan. They averred (see para 5 of the affidavit of the second defendant, one of the 5 solicitors) that the bank credited that sum to the current account of the borrower (account no.1333-03791-1) "to reduce the borrower's overdraft standing at RM57,987.54 as at 3 July 1987 thereby creating a credit of RM1,016.46 as at 3 July 1987". What has to be noted is that the sum was released to the same account number which was stipulated in the bank's letter of approval for the loan to the borrower (see CTZ1 at p. 67 of appeal record) i.e. account no.1333-03791-1. The sum was clearly released as a loan and that the said sum reduced the borrower's overdraft standing is quite irrelevant. Once the said sum was released to the account of the borrower which was stipulated in the bank's letter of approval, the money ceased to be the money of the bank and it became the money of the borrower.

It is not disputed that the borrower defaulted in the repayment of the loan. The bank complained to the solicitors of the default by the borrower on 11 November 1987 (see letter of bank to solicitors dated 11 November 1987 exhibited to the affidavit of the second defendant solicitors, p. 90 of appeal record). The civil action was filed on 4 October 1988 and clearly the loan remained unpaid at the date for final judgment before the Judge of the Sessions Court.

The loan that was advanced was supposed to have been secured against a charge on the property and had been released on the negligent advice of the solicitors that the charge had been duly presented for registration. If the charge had been registered the bank would have

a been entitled to recover the loan amount by the sale of the said property under s. 256 of the National Land Code and this was surely the recoverable loss which could have been reasonably foreseen by the solicitors.

As is stated in **Charlesworth and Percy on Negligence**, 8 Edn, 654, the broad and fundamental principle as to damages remains as stated over a century ago by Lord Blackburn in *Livingstone v. Raywards Coal Co* [1880] 5 App Cas 25 who opined that the measure of b damages was "that sum of money which will put the party who has been injured or who has suffered, in the same position as he would have been in if he had not suffered the wrong for which he is now getting his compensation or reparation". As has been pointed out by the authors in this regard it matters not whether the claim against the negligent solicitor is based in contract or tort.

c The recoverable loss is that, which could reasonably have been foreseen.

It is not for the solicitors to say that the bank should have mitigated damages by suing the borrower for the loan or by taking proceedings to remove the caveat. I cannot see the bank as having any standing to take proceedings to remove the caveat. In any event it is difficult to see why the bank which in the normal course of banking business prudently relied on the legal device of a charge on the said property to make good any default on a loan and which d called for and confidently relied on the advice of the solicitors, but which now as has been admitted by them to be quite wrong advice, should be put to extra expense and protacted legal proceedings to recover the loan amount from the borrower himself if at all any of the said amount can be recovered from the borrower (see e.g. *Pilkington v. Wood* [1953] 2A11 ER 810 at 813).

e In the circumstances, at the end of the hearing I held that there was no merit in the appeal of the solicitors against the decision of the Judge of the Sessions Court giving judgment to the bank under O. 26A of the Rules who was entitled to enter summary judgment in favour of the bank bearing in mind *Drummer v. Brown* [1953] Qb 710. However, Counsel for the respondent bank has conceded that the sum of RM996 should have been deducted from the sum of RM60,000 and the interest given should have been at 11% p.a. from 3 July 1987 up f to date of judgment in the Sessions Court and thereafter at 8%.

I therefore allowed the appeal of the solicitors in part. I order the sum of RM996 be deducted from the sum of RM60,000 awarded by the Judge and varied the interest on the decreased amount at 11% from the date the loan was released up to the date of judgment in the Sessions Court and at 8% from the date of judgment to the date of realisation. I awarded costs to the respondent and made an order for the deposit of the appellant to be applied to g the account of costs.

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